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- and -

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

MARKETXT HOLDINGS CORP., et al.,

Chapter 11

Case No. 04 B 12078 (ALG)
(Substantively Consolidated)

Debtor.

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ALAN NISSELSON, as Chapter 11
Trustee of MARKETXT HOLDINGS CORP.,
and the
OFFICIAL COMMITTEE OF UNSECURED
CREDITORS,

Adv. Proc. No. 08-1102(ALG)

Plaintiffs,

-v.-

KEVIN WALTZER and
STEWART F. GROSSMAN, trustee
of the Newton Trust,

Defendants.

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**COUNTER-STATEMENT OF ISSUES ON APPEAL
AND DESIGNATION OF ITEMS FOR THE RECORD**

Alan Nisselson, Chapter 11 Distribution Agent and Responsible Officer (“Responsible Officer”), under the confirmed Plan for the substantively consolidated estate of MarketXT Holdings Corp., MarketXT, Inc. and Epoch Investments, LP f/k/a Empyrean Investments, L.P. (collectively, the “Debtor”), and the Plan Committee (“Plan Committee,” and collectively with the Responsible Officer, the “Plaintiffs”) by and through their respective attorneys, Windels Marx Lane & Mittendorf LLP and Kaye Scholer LLP respectfully submit the following Counter-statement of Issues and Designation of Items for the Record with respect to Kevin Waltzer and Stewart F. Grossman’s (“Defendants”) appeal from the Counter Order (1) Granting Summary Judgment to Plaintiffs on Third Claim of Relief Subordinating Claim No. 4 of The Newton Trust as Assignee in Interest of Kevin Waltzer (the “Waltzer Claim”); (2) Denying Motion to Dismiss the Third Claim for Relief; and (3) Dismissing the First and Second Claims for Relief, and deeming such claims for relief as objections to claims under Rule 3007 of the Federal Rules of Bankruptcy Procedure entered in this adversary proceeding on June 4, 2008 in favor of Plaintiffs (the “Counter-Order”), following an opinion marked “Not for Publication” of the Honorable Allan L. Gropper dated May 22, 2008 (the “Appealed Opinion”), mandating the subordination of the Waltzer Claim pursuant to Section 510(b) of the Bankruptcy Code. The Responsible Officer and Plan Committee respectfully submit this Counter-Statement of Issues on Appeal and Designation of the Record in response to Plaintiffs’ Statement of Issues on Appeal and Designation of the Record filed with the Court on June 16, 2008.

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the Bankruptcy Court err in determining that Section 510(b) of the Bankruptcy Code mandated the subordination of the Waltzer Claim?

COUNTER-DESIGNATION OF RECORD ON APPEAL

The Plaintiffs submit the following counter-designation of items from the Bankruptcy Court docket to be included in the record of this appeal.

- a. Letter To The Honorable Allan L. Gropper, On Behalf Of Alan Nisselson, Chapter 11 Trustee, In Response To The Motion Of Kevin Waltzer and Stuart F. Grossman To Allow Claim For Voting Purposes Pursuant To Bankruptcy Rule 3018(a) Filed by Alan Nisselson (Case No. 04-12078; Docket No. 1342);
- b. Letter filed by Laurence May on behalf of Stewart F Grossman, Trustee of the Newton Trust (Case No. 04-12078; Docket No. 1364);
- c. Transcript of Hearing held on 4/9/2008 at 10:00 AM at Courtroom 617 before The Honorable Allan L. Gropper (Adv. Proc. No. 08-1102).¹

Dated: New York, New York
June 25, 2008

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¹ In accordance with F.R.B.P. 8006, Plaintiffs' written request for the transcript in Adversary Proceeding No. 08-1102 is annexed hereto as Exhibit A.